

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ROBIN AVERY,	)	
	)	No. 08-139-HU
Plaintiff,	)	
	)	
v.	)	
	)	OPINION AND ORDER
DANIEL N. GORDON, DANIEL N.	)	
GORDON, P.C., and FIRST	)	
RESOLUTION INVESTMENT	)	
CORPORATION,	)	
	)	
Defendants.	)	
	)	

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HUBEL, Magistrate Judge:

This is an action for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (FDCPA). Plaintiff Robin Avery asserts three claims for relief against First Resolution Investment

1 Corporation (First Resolution) and its collections attorney, Dan  
2 Gordon and Daniel N. Gordon, PC (the Gordon defendants). All  
3 parties move for summary judgment. Avery also moves for a stay of  
4 proceedings on her third claim for relief.

### 5 **Factual and Procedural Background**

6 Robin Avery had a credit card account with Providian Bank.  
7 According to her declaration, "sometime after May 2001," she  
8 received from Providian an amended cardholder agreement dated  
9 "6/01." Declaration of Robin Avery ¶ 2, Exhibit 1, p. 7 ("the 6/01  
10 Cardholder Agreement"). Defendants do not dispute that the 6/01  
11 Cardholder Agreement governs Avery's account.

12 The 6/01 Cardholder Agreement had a choice of law provision  
13 calling for the application of federal law and the law of New  
14 Hampshire. Id. at Exhibit 1, p. 5. The law of New Hampshire  
15 provides for a three year statute of limitations on actions related  
16 to disputes over credit card accounts. N. H. Rev. Stat. Ann. 508:4;  
17 A & B Lumber Co. v. Vrusho, 871 A.2d 64, 66 (N.H. 2005) (under New  
18 Hampshire law, contract claim must be brought within three years of  
19 breach).

20 Avery made a payment on her account in November 2001, but  
21 admits that she failed to make the next payment, which was due  
22 December 16, 2001. Avery Declaration ¶ 3.

23 The debt was sold to First Resolution. On February 9, 2006,  
24 First Resolution commenced a civil action in the Circuit Court of  
25 Oregon for Washington County in an attempt to collect the debt,  
26 First Resolution Investment Corp. v. Avery, No. 060477CV (the first  
27

1 Washington County action). Gordon Defendants' Concise Statement of  
2 Fact (CSF) No. 4. First Resolution was represented by Derrick  
3 McGavic and Kristin Finney. Id.

4 In September 2006, Finney was contacted by Avery's attorney,  
5 who told her he believed the first Washington County action was  
6 time-barred. Soon thereafter, First Resolution filed a motion to  
7 dismiss the Washington County action without prejudice. The  
8 Washington County action was dismissed without prejudice on October  
9 11, 2006. Gordon Defendants' CSF No. 7.

10 On December 19, 2006, Avery brought an action in this court,  
11 Avery v. First Resolution Investment Corp. et al., CV 06-1812-HA,  
12 against First Resolution, Mr. McGavic and Ms. Finney, asserting  
13 claims for violation of the FDCPA and the Fair Credit Reporting  
14 Act, 15 U.S.C. § 1681 (the first federal action). Declaration of  
15 Daniel Gordon, Exhibit F. The claims were based on First  
16 Resolution's attempt to collect on the debt in the first Washington  
17 County action after expiration of the statute of limitations. Id.  
18 The governing cardholder agreement was not attached to the  
19 complaint. Although Avery alleged that the defendants had attempted  
20 to collect interest, fees and charges not authorized by the  
21 agreement or permitted by law, she did not specify the amount  
22 defendants had attempted to collect or the amount of the debt she  
23 owed, if any. Id.

24 On January 31, 2007, First Resolution, represented by the  
25 Gordon defendants, asserted a counterclaim against Avery in the  
26 first federal action, alleging that Avery owed First Resolution  
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1 \$3,807.28 as of June 24, 2002. Gordon Declaration, Exhibit C. As  
2 part of the counterclaim, First Resolution attached a copy of a  
3 cardholder agreement which it alleged was the basis for Avery's  
4 liability, dated "11/00" with an amendment dated "5/01" ("the 11/00  
5 Cardholder Agreement"). Id.; Plaintiff's CSF, Exhibit A.

6 On cross motions for partial summary judgment, Judge Haggerty  
7 issued an Opinion and Order on May 25, 2007. Gordon Declaration,  
8 Exhibit A; see also Avery v. First Resolution Inv. Corp., CV 06-  
9 1812-HA, doc. # 47. In the Opinion and Order, Judge Haggerty held  
10 that collection of the debt was not time-barred under the laws of  
11 New Hampshire. Id. Judge Haggerty's reasoning was that under New  
12 Hampshire law, the statute of limitations is tolled during a  
13 party's absence from the state. Since Avery never lived in New  
14 Hampshire and was never there, the three year statute of  
15 limitations was tolled.

16 Judge Haggerty acknowledged that the New Hampshire tolling  
17 provision would preclude the statute of limitations from ever  
18 running on the underlying debt. Id. at p. 9. To resolve this  
19 problem, Judge Haggerty applied Oregon's limitation provision:

20 If the court determines that the limitation period of  
21 another state applicable under ORS 12.430 and 12.440 is  
22 substantially different from the limitation period of  
23 this state and has not afforded a fair opportunity to sue  
upon, or imposes an unfair burden in defending against  
the claim, the limitation period of this state applies.

24 Or. Rev. Stat. § 12.450. Since Oregon law provides a six year  
25 statute of limitations for breach of contract claims, Or. Rev.  
26 Stat. § 12.090, Judge Haggerty concluded that under Oregon law the

1 statute of limitations on Avery's debt would not expire until  
2 November 5, 2007, making the first Washington County action timely.  
3 Id. Accordingly, Judge Haggerty granted First Resolution's motion  
4 for partial summary judgment and denied Avery's motion for partial  
5 summary judgment. Id.

6 Judge Haggerty declined to take supplemental jurisdiction over  
7 the counterclaim. Id. On August 6, 2007, the parties submitted a  
8 proposed form of stipulated judgment (doc. # 56) dismissing Avery's  
9 complaint with prejudice. On August 7, 2007, Judge Haggerty entered  
10 a judgment dismissing Avery's complaint with prejudice and  
11 dismissing First Resolution's counterclaim without prejudice. (Doc.  
12 # 57). On August 17, 2007, Avery appealed Judge Haggerty's ruling  
13 that the first Washington County action was timely under New  
14 Hampshire law, and the dismissal of her FDCPA claim based on the  
15 filing of the first Washington County action. (Doc. # 59);  
16 Plaintiff's CSF Exhibit B, ¶ 32. That appeal is still pending.

17 Meanwhile, on June 8, 2007, First Resolution had commenced  
18 another action in Washington County, First Resolution Investment  
19 Corp. v. Avery, No. 072380CV (the second Washington County action).  
20 Abbott Declaration, Exhibit 1 and Plaintiff's CSF Exhibit B. In the  
21 complaint, First Resolution demanded the sum of \$3,807.28, plus  
22 interest at the rate of 23.99% per annum from June 24, 2002, till  
23 paid. Abbott Declaration, Exhibit 1. Attached to the complaint was  
24 a cardholder agreement showing a date of "9/00." Id.

25 A stipulated document entitled "Submission of Controversy" was  
26 filed in the second Washington County case, stating that the amount  
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1 owed at the time of default on December 16, 2001 was \$2,971.82 plus  
2 interest at 23.99% per annum, for a total due as of December 16,  
3 2001 of \$3,021.04. Plaintiff's CSF Exhibit B, ¶ 13.

4 On January 31, 2008, Avery filed the present action in this  
5 court, based on the counterclaim filed by First Resolution and the  
6 Gordon Defendants in the first federal action. She claimed  
7 statutory damages under the FDCPA for First Resolution's attempt to  
8 collect more than was authorized by the 6/01 Cardholder Agreement  
9 and for its attempt to collect a debt pursuant to the terms of an  
10 invalid cardholder agreement, i.e., the 11/00 Cardholder Agreement  
11 attached to the counterclaim; she also sought to preserve her  
12 rights if the Court of Appeals reversed Judge Haggerty's ruling  
13 that First Resolution's action on Avery's debt was not time-barred.

14 On August 8, 2007, Avery filed a motion to dismiss the second  
15 Washington County case, on the ground that another action was  
16 pending between the same parties for the same cause of action. The  
17 motion was denied on November 28, 2007. Plaintiff's CSF, Exhibit B,  
18 ¶¶ 24, 31. The parties stipulated to facts for trial. See  
19 Plaintiff's CSF, Exhibit B.

#### 20 **Standard**

21 The FDCPA prohibits false, deceptive, misleading, unfair or  
22 harassing collection practices, 15 U.S.C. § 1692e. Baker v. G.C.  
23 Services Corp., 677 F.2d 775 (9<sup>th</sup> Cir. 1982). Among the  
24 misrepresentations explicitly prohibited by the FDCPA are 1) the  
25 false representation of the character, amount or legal status of  
26 any debt, 15 U.S.C. § 1692e(2)(A); 2) the threat to take any action

1 that cannot legally be taken or that is not intended to be taken,  
2 15 U.S.C. § 1692e(5); and communicating or threatening to  
3 communicate to any person credit information which is known or  
4 which should be known to be false, including the failure to  
5 communicate that a debt is disputed, 15 U.S.C. § 1692e(8). The  
6 court determines whether a communication violates the FDCPA by  
7 inquiring whether it is "likely to deceive or mislead a  
8 hypothetical 'least sophisticated debtor.'" Wade v. Regional Credit  
9 Ass'n, 87 F.3d 1098, 1100 (9<sup>th</sup> Cir. 1996).

10 The FDCPA regulates the conduct of "any person" in "any  
11 business" whose 1) principal purpose is debt collection, or 2) who  
12 regularly collects or attempts to collect debts, directly or  
13 indirectly. 15 U.S.C. § 1692a(6). In Heintz v. Jenkins, 514 U.S.  
14 291, 297 (1995), the Supreme Court held that debt collectors may  
15 include attorneys litigating cases on behalf of their clients:  
16 "[L]itigating ... seems simply one way of collecting a debt." A  
17 lawyer who regularly tries to obtain payment of consumer debts  
18 through legal proceedings is a lawyer who regularly "attempts" to  
19 "collect" those consumer debts. Id.

20 Section 1692k provides for two different causes of action, a  
21 compensatory one under § 1692(a)(1), which provides the injured  
22 person a remedy for actual and additional damages for a debt  
23 collector's failure to comply with the FDCPA, and a regulatory one  
24 under § 1692k(a)(2)(A) which allows the court to award additional  
25 or statutory damages not exceeding \$1,000 per proceeding, per  
26 defendant, without regard to the actual number of violations and  
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1 without proof of actual damages. These so-called statutory damages  
2 are awarded based upon mandatory consideration of certain factors.  
3 Id. at § 1692(k). The FDCPA has been construed as a strict  
4 liability statute, subject to a bona fide error defense. See §  
5 1692(a)-(d); Clark v. Capital Credit & Collection Services, 460  
6 F.3d 1162, 1176 & n. 11 (9<sup>th</sup> Cir. 2006).

### 7 **Discussion**

#### 8 A. Avery's Motion for Summary Judgment and Stay on Third Claim

9 Avery's three causes of action are for 1) attempted collection  
10 of unauthorized charges, based on incorrect allegations of the  
11 amount due (i.e., the inconsistency between the stipulation in the  
12 second Washington County action that the amount of the debt was  
13 \$3,021.04, and the demand for \$3,807.28, on the counterclaim of the  
14 first federal action); 2) attempted collection based on an invalid  
15 cardholder agreement (i.e., the allegation in the counterclaim that  
16 the 11/00 cardholder agreement applied, even though the defendants  
17 do not now dispute that the 6/01 cardholder agreement is  
18 applicable); and 3) attempted collection of a time-barred debt.

19 Avery asserts that there are no genuine issues of material  
20 fact on the first two claims and that she is entitled to judgment  
21 as a matter of law. She asks that the court enter a stay of  
22 proceedings on her third claim pending the appeal of Judge  
23 Haggerty's ruling.

#### 24 1. Attempted collection of unauthorized charges

25 In the first federal action, First Resolution counterclaimed  
26 for the sum of \$3,807.28 plus 23.99% per annum interest from June  
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24, 2002 until paid. See Plaintiff's CSF Exhibit A (First Resolution's counterclaim). Avery directs the court to the Submission of Controversy submitted in the second Washington County Action, where First Resolution stipulated that the amount owed was \$3,021.04, plus interest at 23.99%, as of December 16, 2001. See id. Exhibit B, ¶ 13. Avery argues that 23.99% interest accrued on \$3,021.04 to June 24, 2001 would yield a total of \$3,398.30, not \$3,807.28. Thus, she argues, First Resolution demanded, in the first federal action, \$408.98 more than the amount First Resolution agreed was due in the second Washington County action.

I am unpersuaded by Avery's argument that she is entitled to summary judgment on her FDCPA claim based on the different amounts claimed. The stipulation in the second Washington County action, which was for less than the amount originally demanded in the counterclaim, does not constitute an admission that the amount demanded in the counterclaim was incorrect. Further, the absence of any definitive calculation, by either side, of the amount actually due under the 6/01 cardholder agreement precludes a finding that there is no genuine issue of material fact on this issue. The court is unable, on this record, to conclude that no reasonable jury could find that the amount owed was any amount other than the amount on the spreadsheet proffered by Avery, or the amount claimed by First Resolution, or the amount shown on the billing statements. Neither side is entitled to summary judgment.

## 2. Invalid cardholder agreement

In the first federal action, First Resolution alleged that

1 Avery was liable pursuant to the terms of the 11/00 Cardholder  
2 Agreement, as amended and superseded by the terms of the 5/01  
3 Cardholder Agreement. Avery asserts that the governing agreement is  
4 the 6/01 Cardholder Agreement. Defendants do not dispute this  
5 assertion. The terms of the two agreements are materially  
6 different, particularly because the 6/01 Cardholder Agreement has  
7 a grace period and no annual fee, but also because the fees for  
8 cash advances under the 11/00 Cardholder Agreement are 5% while the  
9 6/01 Cardholder Agreement only charges 3%. Further, the 5/01  
10 Amendment to the 11/00 Cardholder Agreement provides for a 27.99%  
11 APR, while the 6/01 Cardholder Agreement provided for finance  
12 charges at 23.99% APR.

13 Avery asserts that First Resolution's allegation in the first  
14 federal action that the debt was governed by the 11/00 Cardholder  
15 Agreement, rather than the 6/01 Cardholder Agreement, constituted  
16 1) false representation of the character, amount or legal status of  
17 the debt; 2) a false representation that Avery was liable for the  
18 debt pursuant to terms that did not apply to her debt; and 3) the  
19 use of a false, deceptive, or misleading representation in  
20 connection with collection of the debt, all in violation of 15  
21 U.S.C. § 1692(e).

22 Since Avery incurred no damages as a result of this conduct,  
23 she asks the court to award her \$1,000 per defendant as statutory  
24 damages, along with her costs and attorney's fees.

25 Defendants respond that Avery has not met her burden of  
26 showing "with specificity" how a particular action "falsely  
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1 represents the character, amount or legal status" of a debt, citing  
2 Dunlap v. Credit Protection Association, LP, 49 F.3d 1011 (9<sup>th</sup> Cir.  
3 2005). They argue that the mere attachment of the 11/00 Cardholder  
4 Agreement to the counterclaim was not necessarily a  
5 misrepresentation of the character, amount or legal status of the  
6 debt, because 1) it is undisputed that the debt was a credit card  
7 debt, and it is undisputed that defendants represented it as such  
8 in the counterclaim; 2) there is no evidence that defendants sought  
9 to collect anything more than what Avery actually owed; and 3)  
10 defendants did not misrepresent the "legal status" of the debt,  
11 because Avery concedes that she used the card and defaulted on her  
12 payment obligations. Plaintiff's CSF 1, 2. Defendants assert that  
13 they accurately represented the "legal status" of default in the  
14 counterclaim, irrespective of which cardholder agreement they  
15 attached.

16 Defendants also challenge Avery's claim that defendants  
17 "falsely represented that plaintiff was liable for the Debt  
18 pursuant to terms that did not apply." Again, defendants argue that  
19 merely attaching the 11/00 Cardholder Agreement fails to qualify as  
20 specific identification of, and evidence supporting, an alleged  
21 misrepresentation of the debt under Dunlap. They contend that while  
22 Avery may have identified differences between certain terms of the  
23 6/01 Cardholder Agreement and the 11/00 Cardholder Agreement, she  
24 has presented no evidence that the \$3,807.12 sought in the  
25 counterclaim was not authorized by the 6/01 Cardholder Agreement.  
26 Defendants assert that merely attaching a superseded agreement,  
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1 without attempting to collect anything pursuant to the terms of  
2 that agreement, does not violate the FDCPA.

3 In her reply, Avery argues that defendants themselves alleged  
4 in their counterclaim all the facts necessary to make out her  
5 claim: that pursuant to the Cardholder Agreement, Avery purchased  
6 goods, merchandise, and/or services and/or received advances using  
7 credit card under the agreement, that each use of the card  
8 constituted an agreement to be bound by the agreement, and that  
9 Avery breached and was in default of the agreement by failing to  
10 make the monthly payments. Avery contends that the defendants also  
11 sought to collect attorney fees in the counterclaim by alleging  
12 that in the Cardholder Agreement, Avery had promised to pay  
13 collection costs incurred, including attorney's fees, and that  
14 First Resolution was entitled to those attorney's fees and costs.  
15 See Gordon Declaration, Exhibit C; Plaintiff's CSF Exhibit A  
16 (counterclaim). She asserts that all these statements were false  
17 because she did not purchase anything under the 11/00 Cardholder  
18 Agreement attached to the counterclaim, so that each use of the  
19 credit card did not constitute her agreement to be bound by its  
20 terms, she was not in breach, was not in default of the 11/00  
21 Cardholder Agreement, and did not agree to pay attorney's fees and  
22 costs under the 11/00 Cardholder Agreement.

23 She argues that this claim is based upon defendants' false  
24 representations and allegations as to the basis of her liability  
25 for the debt, not the amount; because defendants' representations  
26 in their counterclaim were false, and the applicable agreement is

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1 the 6/01 Cardholder Agreement, they are liable under the FDCPA.

2 Defendants have not demonstrated the existence of a genuine  
3 issue of material fact on this claim. Avery's motion for summary  
4 judgment is granted.

5 3. Attempted collection of a time-barred debt

6 Avery asserts that this claim is brought on a precautionary  
7 basis, to preserve it if Judge Haggerty's ruling in the first  
8 federal action is reversed. Avery asks the court to stay all  
9 proceedings under this claim pending the ruling of the Court of  
10 Appeals.

11 Defendants challenge Avery's request for a stay, arguing that  
12 the court is precluded from granting the request by Judge  
13 Haggerty's Opinion and Order. Defendants rely on Tripati v. Henman,  
14 857 F.2d 1366, 1368 (9<sup>th</sup> Cir. 1988):

15 [t]he established rule in the federal courts is that a  
16 final judgment retains all of its res judicata  
17 consequences pending decision of the appeal. To deny  
18 preclusion in these circumstances would lead to an absurd  
19 result: Litigants would be able to refile identical cases  
20 while appeals are pending, enmeshing their opponents and  
21 the court system in tangles of duplicative litigation.

22 (internal citations and quotations omitted). Defendants point out  
23 that Avery has now filed three FDCPA cases in this court, all  
24 asserting that the statute of limitations on the debt expired in  
25 November 2001: the first federal action, this action, and Avery v.  
26 Aylsworth, CV 08-695-HA, filed after this action in June 2008.

27 In reply, Avery asserts that defendants have pointed to no  
28 prejudice to them that would be caused by a stay and that a stay,  
being equitable in nature, is well within the court's discretion.

1 She also points out that to the extent she prevails on her other  
2 two claims for relief, and is awarded the full \$1,000 per  
3 defendant, the third claim for relief would become moot.

4 Avery's motion for stay of proceedings on her third claim for  
5 relief is denied. Defendants' motion against the third claim for  
6 relief, on the merits, is discussed below.

7 B. Defendants' Motions for Summary Judgment

8 The Gordon defendants move for summary judgment in their favor  
9 on the following grounds:

10 First, that Avery's claims are barred by the FDCPA's one-year  
11 statute of limitations.

12 Second, that her claims fail as a matter of law because  
13 defendants never communicated directly with her in connection with  
14 the counterclaim; all communications were through lawyers.

15 Third, that Avery's third claim for relief, which is that  
16 First Resolution's counterclaim in the first federal action was  
17 beyond the statute of limitations, is barred by issue preclusion.

18 Fourth, that defendants are entitled to summary judgment under  
19 the FDCPA's bona fide error defense, based on the reliance of the  
20 Gordon defendants on information provided by First Resolution and  
21 procedures he maintains to avoid errors in collections actions.

22 Defendant First Resolution incorporates by reference all  
23 arguments of the Gordon defendants and adds another, which is that  
24 all of Avery's claims, and not just the third, are precluded by the  
25 judgment entered by Judge Haggerty.

26 ///

1 Avery objects to the court's consideration of First  
2 Resolution's motion for summary judgment because First Resolution  
3 has not submitted its own Concise Statement of Fact, as required by  
4 LR 56.1(a)(2), and has not specifically incorporated any arguments,  
5 briefing or documents from the Gordon defendants' motion. The  
6 objection is overruled.

7 1. FDCPA claims time-barred

8 The defendants rely on the FDCPA's statute of limitations,  
9 which provides that actions to enforce liability for violations of  
10 the FDCPA must be brought "within one year from the date on which  
11 the violation occurs." 15 U.S.C. § 1692k(d). When the alleged  
12 violation is the filing of a complaint, the statute begins to run  
13 on the day the complaint is filed. Naas v. Stolman, 130 F.3d 892,  
14 893 (9<sup>th</sup> Cir. 1997) (filing date was the debt collector's "last  
15 opportunity to comply with the Act"). Id.

16 The counterclaim was filed in the first federal action on  
17 January 31, 2007. Defendants argue that the statute of limitations  
18 expired 365 days later, on January 30, 2008, citing an Eighth  
19 Circuit case, Mattson v. U.S. West Communications, 967 F.2d 259 (8<sup>th</sup>  
20 Cir. 1992). The present action was filed on January 31, 2008.

21 Avery challenges the authority of Mattson, arguing that every  
22 other circuit to have considered the issue has rejected the holding  
23 in Mattson. [Citing Johnson v. Riddle, 305 F.3d 1107 (10<sup>th</sup> Cir.  
24 2002); Maloy v. Phillips, 64 F.3d 607 (11<sup>th</sup> Cir. 1995); and Clark  
25 v. Bonded Adjustment Co., 176 F. Supp.2d 1062 (E.D. Wash. 2001)].  
26 In Riddle, the court found Mattson "dubious authority" because it

1 relied for its conclusion on a single case, Rust v. Quality Car  
2 Corral, Inc., 614 F.2d 1118 (6<sup>th</sup> Cir. 1980), and the Rust case has  
3 since been overruled on the same grounds by the Sixth Circuit,  
4 Bartlik v. United States Dept. of Labor, 62 F.3d 163, 166 (6<sup>th</sup> Cir.  
5 1995) (en banc) (holding that computation of time under the Energy  
6 Reorganization Act, providing for judicial review within 60 days of  
7 the issuance of the Secretary's order, was governed by Rule 6(a),  
8 which added a 61<sup>st</sup> day because the last day was a Sunday).<sup>6</sup>

9 In this jurisdiction, "one year" means one calendar year, not  
10 365 days. United States v. Tawab, 984 F.2d 1533, 1534 (9<sup>th</sup> Cir.  
11 1993). In the Clark case, the court relied on Tawab to conclude  
12 that an action for violation of the FDCPA was timely because it was  
13 filed on the first week day after the violation. The Clark court  
14 noted that some courts had found Rule 6(a) not applicable to the  
15 FDCPA, specifically the Mattson case, but declined to follow the  
16 rationale of Mattson, instead adopting the view taken by the  
17 Eleventh Circuit in Maloy. The Clark court also acknowledged that  
18 in Morgovsky v. Creditors Collection Svc. of San Francisco, 1995 WL  
19 316970 at \*1, 2 (N.D. Cal. 1995), the district court had adopted  
20 Mattson's holding; the Clark court declined to follow Morgovsky  
21 because that decision, like Mattson, did not involve analysis of  
22 the statutory text or legislative history.

23 I find the Clark case persuasive. Because the counterclaim was  
24 filed January 31, 2007, the statute of limitations began to run on  
25 that date; this action, filed January 31, 2008, is therefore timely  
26 under the FDCPA's one year statute of limitations. The defendants'



1 motion for partial summary judgment on limitations grounds is  
2 therefore denied.

3 2. No direct communication

4 Defendants assert that Avery's claims fail as a matter of law  
5 because it is undisputed that in serving the counterclaim  
6 electronically, defendants communicated only with Avery's attorney,  
7 and never with her directly.<sup>1</sup> Daniel Gordon states in his  
8 Declaration that because Avery was represented by an attorney at  
9 the time he began collection attempts (i.e., at the time he filed  
10 the counterclaim in the first federal action), he never contacted  
11 Avery about the debt.

12 The defendants argue that in this jurisdiction, communications  
13 directed solely at a debtor's attorney do not violate the FDCPA as  
14 a matter of law, citing Guerrero v. RJM Acquisitions LLC, 499 F.3d  
15 926 (9<sup>th</sup> Cir. 2007) (debt collector's misleading communications to  
16 debtor's attorney, not to debtor, not actionable under FDCPA). They  
17 contend that this rule is consistent with the purpose of the  
18 statute, which was enacted to protect vulnerable and  
19 unsophisticated debtors from abuse, harassment and deceptive  
20 collection practices. See S. Rep. 95-382, reprinted in 1977  
21 U.S.C.C.A.N. 1695, 1696; Guerrero, 499 F.3d at 935. Defendants  
22 argue that the FDCPA's concerns are particularly inapplicable when  
23 the communication at issue is a pleading, because a pleading is  
24 "not a demand to the debtor," quoting Argentieri v. Fisher

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25  
26 <sup>1</sup> Under the FDCPA, a debt collector may not communicate with  
27 a consumer if the debt collector knows the consumer is  
28 represented by an attorney. 15 U.S.C. § 1692c(a)(2).

1 Landscapes, 15 F. Supp.2d 55 (D. Mass. 1998) (unfounded request for  
2 attorneys fees in state court complaint not a violation of FDCPA).  
3 Defendants argue that Avery's first and second claims for relief,  
4 which are based on allegations made in the counterclaim, fail as a  
5 matter of law because they were not demands made on Avery directly.

6 Avery counters that Guerrero is limited to extrajudicial  
7 communications and does not extend to misrepresentations during  
8 litigation, citing Heintz, 514 U.S. at 297 (statutory term "debt  
9 collector" includes attorneys and others engaged in litigation).

10 Avery distinguishes Guerrero on the ground that it involved  
11 communication directed solely at the attorney, unaccompanied by any  
12 threat to the debtor. 499 F.3d at 936. The court emphasized that

13 the Act applies to conduct aimed at a debtor himself  
14 regardless of whether he has retained counsel. We merely  
15 hold that when the debt collector ceases contact with the  
16 debtor, and instead communicates exclusively with an  
17 attorney hired to represent the debtor in the matter, the  
18 Act's strictures no longer apply to those communications.

19 499 F.3d at 939.

20 Avery also challenges the defendants' characterization of the  
21 holding in Guerrero, arguing that the FDCPA distinguishes between  
22 regulation of collection activity and regulation of communication,  
23 having separate provisions that deal with communication. See,  
24 (e.g., §§ 1692b (communication with third parties to obtain  
25 location information), 1692c (conduct actionable as communication),  
26 1692e(3) (false communication), 1692e(8) (communication of credit  
27 information), 1692e(9) (regulating written communication)  
28 1692e(11) (disclosures in communications), 1692f(5) (charges related

1 to communications), 1692f(7)(communication through the mail),  
2 1692f(8)(communication through the mail), and 1692g (disclosure of  
3 consumer rights). She contends that the distinction between  
4 regulation of collection activity and regulation of communication  
5 is also seen in a recent amendment to the FDCPA, with § 1692g(b)  
6 expressly distinguishing between collection activities and  
7 communications, and § 1692g(d) excluding § 1692g(a) from formal  
8 pleadings in a civil action.

9 Avery argues that the construction sought by the Gordon  
10 defendants was decided adversely to them in Heintz, where the  
11 Supreme Court held that the FDCPA applies to attorneys even when  
12 the collection activity consists of litigation. Further, she  
13 argues, the court in Guerrero qualified the communication at issue  
14 as a responsive letter to an attorney's letter, one which was  
15 directed exclusively at the attorney.

16 I find Avery's arguments persuasive, and additionally conclude  
17 that a counterclaim for a debt is not a representation made to an  
18 attorney, but rather a demand for money made on the debtor, through  
19 a pleading rather than a letter or a phone call. Under Guerrero the  
20 issue is whether the conduct is aimed at the debtor, regardless of  
21 whether the debtor has a lawyer. The Guerrero court held that the  
22 letter from the debt collector was directed solely at the  
23 creditor's lawyer, because the letter stated that defendant was not  
24 a "collection agency," which was true, and that it was therefore  
25 not subject to the FDCPA, which was not true.

26 Unlike the letter in Guerrero, the counterclaim in the first  
27

1 federal action was directed, not to Avery's attorney, but at Avery.  
2 Guerrero is distinguishable from this case. Defendants' motion for  
3 summary judgment on this basis is denied.

4 3. Claim preclusion

5 The defendants argue that under the doctrine of claim  
6 preclusion, Judge Haggerty's ruling bars Avery from asserting her  
7 third claim for relief, which is for violation of the FDCPA based  
8 on a collection action that is not timely.

9 The defendants argue, correctly, that the judgment entered by  
10 Judge Haggerty retains its preclusive effect while an appeal is  
11 pending. Collins v. D. R. Horton, Inc., 505 F.3d 874, 883 (9<sup>th</sup> Cir.  
12 2007). I agree Avery's third claim for relief is barred by claim  
13 preclusion.

14 First Resolution has a separate claim preclusion argument,  
15 arguing that the first and second claims for relief in this case  
16 were also asserted in the first federal action, so that Avery's  
17 dismissal with prejudice of her claims against First Resolution  
18 prejudice in the first federal action, except for her claim that  
19 the debt was time-barred, bars the assertion of the first and  
20 second claims for relief here.

21 The complaint filed in the first federal action, Declaration  
22 of Daniel Gordon Exhibit F, names defendants First Resolution, Mr.  
23 McGavic, and Ms. Finney, the latter two being the lawyers who  
24 represented First Resolution in the first Washington County action.  
25 The complaint alleges claims for violation of the FDCPA based on  
26 the filing of the first Washington County action.

1 Avery argues that claim preclusion does not apply because the  
2 parties and claims in the first federal action are not the same  
3 parties named and claims asserted in this action. She contends that  
4 at the time the first federal action was filed, her first and  
5 second claims for relief in this case did not yet exist, because  
6 they are based on the counterclaim filed in that action. She argues  
7 that she has not had any prior opportunity to litigate the first  
8 and second claims for relief in this case.

9 I agree with Ms. Avery's contention that the first and second  
10 claims for relief in this case are premised on the counterclaim  
11 filed in the first federal action: the allegation that the 11/00  
12 cardholder agreement, as amended in May 2001, governed the debt;  
13 and the allegation that in the counterclaim, First Resolution  
14 attempted to collect more than was authorized by the 6/01  
15 cardholder agreement. Neither of these claims was dismissed when  
16 Avery dismissed her complaint in the first federal action, because  
17 Avery's complaint in the first federal action did not refer to or  
18 incorporate a specific cardholder agreement. Further, as I have  
19 concluded, the issue of how much Avery owes First Resolution under  
20 the terms of the 6/01 cardholder agreement is a question of fact  
21 that has never been determined. First Resolution's motion for  
22 summary judgment on the first and second claims for relief, based  
23 on claim preclusion, is denied.

24 4. Bona fide error defense

25 The Gordon defendants move for summary judgment in their favor  
26 based on the bona fide error defense.

1 Section 1692k(c) provides that a debt collector  
2 may not be held liable in any action brought under this  
3 subchapter if the debt collector shows by a preponderance  
4 of the evidence that the violation was not intentional  
5 and resulted from a bona fide error notwithstanding the  
6 maintenance of procedures reasonably adapted to avoid any  
7 such error.

8 The FDCPA makes debt collectors liable for violations that are  
9 not knowing or intentional; the bona fide error defense provides a  
10 "narrow exception to strict liability." Reichert v. National Credit  
11 Systems, Inc., 531 F.3d 1002, 1005 (9<sup>th</sup> Cir. 2008). The bona fide  
12 error defense is an affirmative defense, for which the debt  
13 collector has the burden of proof. Reichert, 531 F.3d at 1006; Fox  
14 v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1514 (9<sup>th</sup> Cir. 1994).

15 The Gordon defendants assert that as a matter of law, they  
16 were entitled to rely on representations from First Resolution  
17 about the validity of the debt, and that the FDCPA does not require  
18 an independent investigation of the information provided by clients  
19 when a debt collector tries to collect a debt. The Gordon  
20 defendants rely on Hulse v. Ocwen Federal Bank, 195 F. Supp.2d  
21 1188, 1210 (D. Or. 2002), and on the Ninth Circuit decision in  
22 Clark. In Clark, the court quoted with approval district court  
23 cases from other jurisdictions holding that a debt collector may  
24 reasonably rely upon information provided by a creditor who has  
25 provided accurate information in the past. The Clark court also  
26 held, consistent with the Hulse decision, that the FDCPA does not  
27 impose upon debt collectors any duty to investigate independently  
28 the claims presented by the creditor. The Clark case adopted "as a

1 baseline" the holding of the Fourth Circuit in Chaudhry v.  
2 Gallerizzo, 174 F.3d 394 (4<sup>th</sup> Cir. 1999) that at a minimum,  
3 "verification of a debt involves nothing more than the debt  
4 collector confirming in writing that the amount being demanded is  
5 what the creditor is claiming is owed." Clark, 460 F.3d at 1173-74.

6 However, the bona fide error defense does not protect a debt  
7 collector whose reliance on a creditor's representation is  
8 unreasonable. Reichert, 531 F.3d at 1006; Clark, 460 F.3d at 1177.  
9 A debt collector also fails to meet its burden under the defense  
10 when it fails to produce evidence of "reasonable preventive  
11 procedures" aimed at avoiding the errors. Reichert, 531 F.3d at  
12 1006.

13 Daniel Gordon has submitted a declaration stating that when he  
14 represented First Resolution in the first federal action, he was  
15 directed by First Resolution to obtain Mr. McGavic's file and to  
16 use the information in that file to prosecute the counterclaim.  
17 Gordon states that he reasonably relied on the information in the  
18 McGavick file when he filed the counterclaim; that he had  
19 previously represented First Resolution; and that First Resolution  
20 had been reliable in the past.

21 Gordon states that he maintains many procedures to prevent  
22 FDCPA violations, including employing a compliance officer,  
23 requiring that new employees pass a test on the FDCPA, testing  
24 employees yearly on the FDCPA, scrubbing new files upon intake to  
25 determine whether the debtor has filed for bankruptcy or is  
26 deceased, periodically checking all files in the office to

1 determine that the debt is within the applicable statute of  
2 limitations, contacting the creditor upon receiving a claim from a  
3 debtor disputing the amount or existence of the debt, and ceasing  
4 collection efforts if he is not satisfied, after consulting with  
5 the creditor, that the debtor owes the debt.

6 In Reichert, the court held that the question whether the debt  
7 collector has made a sufficient showing that it employed procedures  
8 "reasonably adapted to avoid the error that occurred" [sic] is a  
9 "fact intensive inquiry that few prior cases have addressed." 531  
10 F.3d at 1006.

11 I conclude, on the basis of the record before me, that a  
12 genuine issue of material fact exists on whether 1) Gordon's  
13 reliance on First Resolution and the McGavic file was reasonable;  
14 and 2) whether the Gordon defendants' office procedures would  
15 reasonably be expected to prevent the errors at issue in this case.  
16 Accordingly, the Gordon defendants' motion for summary judgment in  
17 their favor on the bona fide error defense is denied.

#### 18 **Conclusion**

19 Avery's motion for summary judgment (doc. # 22) is GRANTED for  
20 her second claim for relief, based on an invalid cardholder  
21 agreement, and DENIED on the first and third claims for relief,  
22 based on the amount of the debt and the filing of a time-barred  
23 action. Avery's motion for a stay of proceedings on the third claim  
24 for relief (doc. # 22) is DENIED.

25 The defendants' motions for summary judgment (doc. ## 15, 16)  
26 are DENIED for the first and second claims for relief, and GRANTED  
27



1 for the third claim for relief. The Gordon defendants' motion for  
2 summary judgment on the bona fide error defense (doc. # 16) is  
3 DENIED.

4 Plaintiff's third claim for relief is dismissed with  
5 prejudice.

6 IT IS SO ORDERED.

7  
8 Dated this 27th day of October, 2008.

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11 /s/ Dennis James Hubel  
12 Dennis James Hubel  
United States Magistrate Judge  
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